

First Supplement to Memorandum 94-11

Administrative Adjudication: Request for Exemption of Alcoholic Beverage Control Appeals Board

Attached to this Supplement is a letter from the Alcoholic Beverage Control Appeals Board requesting an exemption from the new Administrative Procedure Act. Also attached are the statutes that apply to the Appeals Board.

Under the constitutional and statutory scheme, the Department of Alcoholic Beverage Control is the enforcement arm and is subject to the Administrative Procedure Act. An administrative law judge assigned by the Office of Administrative Hearings makes the initial decision in ABC licensing disputes. Any party can appeal to the Appeals Board. Asimow, *Administrative Adjudication: Structural Issues*, at 38 n.73 (October 1989).

The Appeals Board is established by Article XX, Section 22, of the California Constitution. This provision makes clear the Appeals Board functions as a review tribunal, and provides procedural rules that cannot be altered by statute:

When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the decision subject to such limitations as may be imposed by the Legislature. In such cases, the board shall not receive evidence in addition to that considered by the department. Review by the board of a decision of the department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department it may enter an order remanding the matter to the department for reconsideration in the light of such evidence. In all other appeals the board shall enter an order either affirming or reversing the decision of the department. When the order reverses the decision of the department, the board may direct the reconsideration of the matter in the light of its order and may direct

the department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the department. Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order.

Judicial review of an Appeals Board decision is by application for a discretionary writ of review from the California Supreme Court or court of appeal. Bus. & Prof. Code § 23090. For this reason, few Appeals Board decisions are reviewed. Asimow, *supra*.

Professor Asimow reports that practitioners are generally displeased with the Appeals Board, believing that it is a rubber stamp for decisions of the Department of Alcoholic Beverage Control. Asimow, *supra*, at 26 n.52, 38 n.74. "Creation of the ABC Appeals Board was accompanied by a sharp restriction on judicial review; practitioners apparently would prefer to dispense with the Appeals Board and get judicial review back." *Id.* at 26 n.52.

The question is whether the Appeals Board should be abolished by amending the Constitution, substituting in its place whatever judicial review provisions the Commission decides to recommend. Professor Asimow's recommendations on judicial review are in his study, A Modern Judicial Review Statute to Replace Administrative Mandamus (November 1993), which has not yet been considered by the Commission. The question of what, if anything, should be done with the Appeals Board should be deferred until we take up judicial review. For present purposes, the Appeals Board should be exempted from the administrative adjudication statute:

Bus. & Prof. Code § 23088.5 (added). Administrative Procedure Act inapplicable

23088.5. Part 4 (commencing with Section 641.110) of Division 3.3 of Title 1 of the Government Code does not apply to determination of an appeal by the board.

Comment. Section 23088.5 makes clear that the adjudicative provisions of the Administrative Procedure Act do not apply to determination of an appeal by the Alcoholic Beverage Control Appeals Board.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

1001 Sixth Street, Suite 401
Sacramento, CA 95814



September 14, 1993

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Subject: Additional Comments on the Tentative
Recommendation dated May 1993,
"Administrative Adjudication by State Agencies"

Dear Mr. Sterling:

This letter is in response to your Memorandum 93-45 dated September 9, 1993 in which you offered to supplement your memorandum with any comments received later. As you will recall, you recently telephonically informed us that the proposed APA would apply to the ABC Appeals Board ("ABCAB").

ABCAB is not covered by the existing APA. ABCAB is a constitutional agency (Article XX, §22, State Constitution) and is not mentioned in Government Code §11501. ABCAB is not to be confused with the Department of ABC ("DABC") which is listed in §11501. See California Administrative Hearing Practice (Cont. Ed. Bar 1984) page 291, Appendix.

It is submitted that ABCAB should not be covered by the proposed APA for the following reasons:

I.

ABCAB functions as a review tribunal, the sole function of which is to review decisions of DABC concerning which aggrieved litigants have filed appeals. ABCAB does not take testimony under oath or permit advocates at oral argument to cross-examine one another (or anyone else); in sum, it does not conduct trial-type adjudicatory hearings. ABCAB's scope of review is virtually identical to that of the Court of Appeal and the California Supreme Court. Compare Business and Professions Code §23084 with

Nathaniel Sterling, Executive Secretary
California Law Revision Commission
September 14, 1993
Page Two

§23090.2. ABCAB permits written briefs and oral argument (Business and Professions Code §23083; Title 4, California Code of Regulations §§193 and 197), just as appellate courts do. It is generally agreed that ABCAB's decisions (referred to in statutory language as "orders") are entitled to substantial respect because the agency is conducted like an appellate court, although its three members are not required to be attorneys.

II.

There is a strong theme of promptness expressed by the Legislature as a guide for ABCAB in the issuance of its orders. See Business and Professions Code §23086¹ and Stats. 1975, Ch. 782, eff. 1/1/76.²

The ideal of promptness is also reflected elsewhere as follows:

The superior court was eliminated from the chain of review in November 1967. See Business and Professions Code §23090 et seq. Jurisdiction of the Court of Appeal or Supreme Court is invoked by the filing of an application for a writ of review, which is discretionary. (*Ibid.*) See also Donia v. Alcoholic Bev. etc. Appeals Bd. (1985) 167 Cal.App.3d 588, 594, (disapproved on other grounds in Kowis v. Howard (1992) 3 Cal.4th 888, 896).

Business and Professions Code §23088 prohibits ABCAB from reconsidering or rehearing its own orders. There is no constitutional or statutory provision for ABCAB to issue proposed decisions.

Were ABCAB to be covered by the proposed APA, it is probable that proposed decisions, reconsiderations and rehearings would result in overjudicialization and would delay the issuance of ABCAB decisions beyond current time frames.

¹The statement in §23086 that "the board shall enter its order within 60 days after the filing of an appeal" has been interpreted as directory rather than mandatory. Koehn v. State Bd. of Equalization (1959) 166 Cal.App.2d 109, 333 P.2d 125. Preparation of the reporter's transcript alone often takes more than 60 days.

²It has generally been recognized that expediting ABC Act proceedings was intended to allow an applicant for a department license to obtain a relatively prompt decision as to whether an applied-for license would be granted or denied.

Nathaniel Sterling, Executive Secretary
California Law Revision Commission
September 14, 1993
Page Three

CONCLUSION

For the above reasons, it is requested that the draft of the tentative recommendation exempt the Alcoholic Beverage Control Appeals Board from coverage by the proposed APA. It should be remembered that ABCAB is a separate constitutional agency from the Department of ABC.

Sincerely,

Edward M. Davis

EDWARD M. DAVIS
Chairman
(916) 445-4005

William B. Eley

WILLIAM B. ELEY
Chief Counsel & Executive Officer
(916) 445-4005

cc: Governor Pete Wilson
Member John B. Tsu
Member Ray T. Blair

Exhibit

Statutes Governing Alcoholic Beverage Control Appeals Board

Bus. & Prof. Code § 23075. Creation of board; appointment of members; compensation

23075. There is in the state government an Alcoholic Beverage Control Appeals Board the members of which shall be appointed and shall serve as provided in Section 22 of Article XX of the Constitution, and shall receive an annual salary as provided for by Chapter 6 (commencing with Section 11550) of Part 1 of Division 3 of Title 2 of the Government Code.

Bus. & Prof. Code § 23076. Appointment, direction, and control of personnel of board; equipment, supplies and housing

23076. All personnel of the Alcoholic Beverage Control Appeals Board shall be appointed, directed and controlled by the board. The director shall furnish the equipment, supplies, and housing necessary to the operation of the board and shall perform such other mechanics of administration as the board and the director may agree upon.

Bus. & Prof. Code § 23077. Powers of board

23077. The Alcoholic Beverage Control Appeals Board shall exercise such powers as are vested in it by Section 22 of Article XX of the Constitution and may adopt such rules pertaining to appeals and other matters within its jurisdiction as may be required. The board and its duly authorized representatives in the performance of its duties under this chapter shall have the powers of a head of a department as set forth in Sections 11180 to 11191, inclusive, of the Government Code.

Bus. & Prof. Code § 23080. "Decision"

23080. As used in this article "decision" means any determination of the department imposing a penalty assessment or affecting a license which may be appealed to the board under Section 22 of Article XX of the Constitution.

Bus. & Prof. Code § 23081. Perfecting appeal; time for filing; procedure

23081. On or before the tenth day after the last day on which reconsideration of a final decision of the department can be ordered, any party aggrieved by a final decision of the department may file an appeal with the board from such decision. The appeal shall be in writing and shall state the grounds upon which a review is sought. A copy of the appeal shall be mailed by the appellant to each party who

appeared in the proceeding before the department, including the department which shall thereafter be treated in all respects as a party to the appeal. The right to appeal shall not be affected by failure to seek reconsideration before the department.

Bus. & Prof. Code § 23081.5. Date appeal deemed filed

23081.5. An appeal to the board shall be deemed filed on the date it is received in the principal office of the board; provided, however, an appeal mailed to the board by means of registered mail shall be deemed filed with the board on the date of the registry with the United States Post Office.

Bus. & Prof. Code § 23082. When decision effective

23082. No decision of the department shall become effective during the period in which an appeal may be filed and the filing of an appeal shall stay the effect of the decision until such time as a final order is made by the board.

Bus. & Prof. Code § 23083. Determination of appeal by board; appearance of appellant; evidence to be considered

23083. The board shall determine the appeal upon the record of the department and upon any briefs which may be filed by the parties. If any party to the appeal requests the right to appear before the board, the board shall fix a time and place for argument. The board shall not receive any evidence other than that contained in the record of the proceedings of the department.

Bus. & Prof. Code § 23083.5. Surcharge on annual license fee

23083.5. (a) The board shall establish a surcharge applicable to the annual fees provided for in Section 23320.

(b) The surcharge set by the board shall be proportionate to the fee charged to each licensee pursuant to Section 23320 and shall provide an amount which is sufficient to pay the actual costs of the board in carrying out its duties commencing July 1, 1982. The surcharge shall not exceed 3 percent applied to the annual fees provided for in Section 23320, but shall otherwise be adjusted periodically to ensure that sufficient amounts are collected to pay these costs. The surcharge shall be collected on behalf of the board by the Department of Alcoholic Beverage Control at the same time the department makes its regular collections of annual fees pursuant to Sections 23320 and 23320.2.

(c) All surcharges collected by the Department of Alcoholic Beverage Control on behalf of the board pursuant to this section shall be deposited in the Alcoholic Beverage Control Appeals Fund, which is hereby created. All moneys in the Alcoholic Beverage Control Appeals Fund shall be available to the board, when appropriated by the Legislature, to pay the actual costs of the board in carrying out its duties, commencing July 1, 1982, under this chapter.

Bus. & Prof. Code § 23084. Questions to be considered by board on review

23084. The review by the board of a decision of the department shall be limited to the questions:

(a) Whether the department has proceeded without, or in excess of, its jurisdiction.

(b) Whether the department has proceeded in the manner required by law.

(c) Whether the decision is supported by the findings.

(d) Whether the findings are supported by substantial evidence in the light of the whole record.

(e) Whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

Bus. & Prof. Code § 23085. Remand to department for reconsideration

23085. In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department, it may enter an order remanding the matter to the department for reconsideration in the light of such evidence. In all other appeals the board shall enter an order either affirming or reversing the decision of the department. When the order reverses the decision of the department, the board may direct the reconsideration of the matter in the light of its order and may direct the department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the department.

Bus. & Prof. Code § 23086. Order; time for entering

23086. In all cases, the board shall enter its order within 60 days after the filing of an appeal.

Bus. & Prof. Code § 23087. Remand on stipulation

23087. Whenever any matter is pending before the board or a court of record involving a dispute between the department and a licensee, petitioner or protestant and the parties to such a dispute agree upon a settlement or adjustment thereof, the tribunal shall upon the stipulation by the parties that such an agreement has been reached, remand the matter to the department.

Bus. & Prof. Code § 23088. Written order on appeal from decision of board; finality

23088. Each order of the board on appeal from a decision of the department shall be in writing and shall be filed by delivering copies to the parties personally or by mailing copies to them by certified mail. Each such order shall become final upon being filed as provided herein, and there shall be no reconsideration or rehearing by the board.

Bus. & Prof. Code § 23089. Review of final orders

23089. Final orders of the board may be reviewed by the courts specified in Article 5 (commencing with Section 23090) of this chapter within the time and in the manner therein specified and not otherwise.

Bus. & Prof. Code § 23090. Parties applying for writ of review

23090. Any person affected by a final order of the board, including the department, may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of review of such final order. The application for writ of review shall be made within 30 days after filing of the final order of the board.

Bus. & Prof. Code § 23090.1. Time and place for return of writ; new evidence; hearing on certified record

23090.1. The writ of review shall be made returnable at a time and place then or thereafter specified by court order and shall direct the board to certify the whole record of the department in the case to the court within the time specified. No new or additional evidence shall be introduced in such court, but the cause shall be heard on the whole record of the department as certified to by the board.

Bus. & Prof. Code § 23090.2. Extent of review; trial de novo

23090.2. The review by the court shall not extend further than to determine, based on the whole record of the department as certified by the board, whether:

- (a) The department has proceeded without or in excess of its jurisdiction.
- (b) The department has proceeded in the manner required by law.
- (c) The decision of the department is supported by the findings.
- (d) The findings in the department's decision are supported by substantial evidence in the light of the whole record.
- (e) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department. Nothing in this article shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence.

Bus. & Prof. Code § 23090.3. Findings on questions of fact; entry of judgment

23090.3. The findings and conclusions of the department on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the department. The board, the department, and each party to the action or proceeding before the board shall have the right to appear in the review proceeding. Following the hearing, the court shall enter judgment either affirming or reversing the decision of the department, or the court may remand the case for further proceedings before or reconsideration by the department.

Bus. & Prof. Code § 23090.4. Applicability of Code of Civil Procedure; service of pleadings

23090.4. The provisions of the Code of Civil Procedure relating to writs of review shall, insofar as applicable, apply to proceedings in the courts as provided by this article. A copy of every pleading filed pursuant to this article shall be served on the board, the department, and on each party who entered an appearance before the board.

Bus. & Prof. Code § 23090.5. Jurisdiction to hear appeals; mandamus

23090.5. No court of this state, except the Supreme Court and the courts of appeal to the extent specified in this article, shall have jurisdiction to review, affirm, reverse, correct, or annul any order, rule, or decision of the department or to suspend, stay, or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the department in the performance of its duties, but a writ of mandate shall lie from the Supreme Court or the courts of appeal in any proper case.

Bus. & Prof. Code § 23090.6. Stay of proceedings

23090.6. The filing of a petition for, or the pendency of, a writ of review shall not of itself stay or suspend the operation of any order, rule, or decision of the department, but the court before which the petition is filed may stay or suspend, in whole or in part, the operation of the order, rule, or decision of the department subject to review, upon the terms and conditions which it by order directs.

Bus. & Prof. Code § 23090.7. Effectiveness of order

23090.7. No decision of the department which has been appealed to the board and no final order of the board shall become effective during the period in which application may be made for a writ of review, as provided by Section 23090.